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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 SUSAN S. KELLEY, )  
7 Plaintiff, ) No. CV-08-00207-JPH  
8 v. ) ORDER GRANTING DEFENDANT'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, )  
11 Defendant. )  
12 )

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13 BEFORE THE COURT are cross-motions for summary judgment noted  
14 for hearing without oral argument on March 6, 2009. (Ct. Rec. 13,  
15 15). Attorney Maureen J. Rosette represents Plaintiff; Special  
16 Assistant United States Attorney David J. Burdett represents the  
17 Commissioner of Social Security ("Commissioner"). The parties  
18 have consented to proceed before a magistrate judge. (Ct. Rec.  
19 19.) On February 26, 2009, plaintiff filed a reply. (Ct. Rec.  
20 18.) After reviewing the administrative record and the briefs  
21 filed by the parties, the court **GRANTS** Defendant's Motion for  
22 Summary Judgment (Ct. Rec. 15) and **DENIES** Plaintiff's Motion for  
23 Summary Judgment (Ct. Rec. 13.)

24 **JURISDICTION**

25 Plaintiff protectively filed applications for disability  
26 insurance benefits (DIB) and supplemental security income on  
27 October 25, 2004, alleging onset as of November 28, 2003. (Tr.  
28

1 92-94, 394-395.) The applications were denied initially and on  
2 reconsideration. (Tr. 80-81, 87-90.)

3 A hearing was held before Administrative Law Judge (ALJ),  
4 Hayward C. Reed on September 5, 2007. (Tr. 429-467 - check).  
5 Plaintiff, represented by counsel, and vocational expert Anne F.  
6 Aastum testified. On November 14, 2007, the ALJ found plaintiff  
7 not disabled. The Appeals Council denied a request for review on  
8 May 14, 2008. (Tr. 6-9.) Therefore, the ALJ's decision became  
9 the final decision of the Commissioner, which is appealable to the  
10 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed  
11 this action for judicial review pursuant to 42 U.S.C. § 405(g) on  
12 June 27, 2008. (Ct. Rec. 4.)

#### 13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing  
15 transcripts, the ALJ's decisions, the briefs of both Plaintiff and  
16 the Commissioner, and are summarized here.

17 Plaintiff was 35 years old at the hearing. (Tr. 433.) She  
18 has a high school education and past as a waitress and cashier.  
19 (Tr. 433-434.) She alleged disability onset as of November 28,  
20 2003, due to degenerative disk disease and depression. (Tr. 98,  
21 101.)

#### 22 **SEQUENTIAL EVALUATION PROCESS**

23 The Social Security Act (the "Act") defines "disability"  
24 as the "inability to engage in any substantial gainful activity by  
25 reason of any medically determinable physical or mental impairment  
26 which can be expected to result in death or which has lasted or  
27 can be expected to last for a continuous period of not less than  
28 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The

1 Act also provides that a Plaintiff shall be determined to be under  
2 a disability only if any impairments are of such severity that a  
3 plaintiff is not only unable to do previous work but cannot,  
4 considering plaintiff's age, education and work experiences,  
5 engage in any other substantial gainful work which exists in the  
6 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
7 Thus, the definition of disability consists of both medical and  
8 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
9 (9<sup>th</sup> Cir. 2001).

10 The Commissioner has established a five-step sequential  
11 evaluation process for determining whether a person is disabled.  
12 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
13 is engaged in substantial gainful activities. If so, benefits are  
14 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
15 not, the decision maker proceeds to step two, which determines  
16 whether plaintiff has a medically severe impairment or combination  
17 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
18 416.920(a)(4)(ii).

19 If plaintiff does not have a severe impairment or combination  
20 of impairments, the disability claim is denied. If the impairment  
21 is severe, the evaluation proceeds to the third step, which  
22 compares plaintiff's impairment with a number of listed  
23 impairments acknowledged by the Commissioner to be so severe as to  
24 preclude substantial gainful activity. 20 C.F.R. §§  
25 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
26 App. 1. If the impairment meets or equals one of the listed  
27 impairments, plaintiff is conclusively presumed to be disabled.  
28 If the impairment is not one conclusively presumed to be

1 disabling, the evaluation proceeds to the fourth step, which  
2 determines whether the impairment prevents plaintiff from  
3 performing work which was performed in the past. If a plaintiff  
4 is able to perform previous work, that Plaintiff is deemed not  
5 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
6 At this step, plaintiff's residual functional capacity ("RFC")  
7 assessment is considered. If plaintiff cannot perform this work,  
8 the fifth and final step in the process determines whether  
9 plaintiff is able to perform other work in the national economy in  
10 view of plaintiff's residual functional capacity, age, education  
11 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
12 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

13 The initial burden of proof rests upon plaintiff to establish  
14 a *prima facie* case of entitlement to disability benefits.  
15 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
16 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
17 met once plaintiff establishes that a physical or mental  
18 impairment prevents the performance of previous work. The burden  
19 then shifts, at step five, to the Commissioner to show that (1)  
20 plaintiff can perform other substantial gainful activity and (2) a  
21 "significant number of jobs exist in the national economy" which  
22 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
23 Cir. 1984).

#### 24 STANDARD OF REVIEW

25 Congress has provided a limited scope of judicial review of a  
26 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
27 the Commissioner's decision, made through an ALJ, when the  
28 determination is not based on legal error and is supported by

1 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
2 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
3 1999). "The [Commissioner's] determination that a plaintiff is  
4 not disabled will be upheld if the findings of fact are supported  
5 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
6 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence  
7 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
8 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
9 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
10 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
11 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
12 evidence as a reasonable mind might accept as adequate to support  
13 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
14 (citations omitted). "[S]uch inferences and conclusions as the  
15 [Commissioner] may reasonably draw from the evidence" will also be  
16 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
17 On review, the Court considers the record as a whole, not just the  
18 evidence supporting the decision of the Commissioner. *Weetman v.*  
19 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
20 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

21 It is the role of the trier of fact, not this Court, to  
22 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
23 evidence supports more than one rational interpretation, the Court  
24 may not substitute its judgment for that of the Commissioner.  
25 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
26 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
27 substantial evidence will still be set aside if the proper legal  
28 standards were not applied in weighing the evidence and making the

1 decision. *Browner v. Secretary of Health and Human Services*, 839  
2 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
3 evidence to support the administrative findings, or if there is  
4 conflicting evidence that will support a finding of either  
5 disability or nondisability, the finding of the Commissioner is  
6 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
7 1987).

#### 8 **ALJ'S FINDINGS**

9 At the outset, the ALJ found plaintiff met the DIB  
10 requirements through June 30, 2007. (Tr. 21.) The ALJ found at  
11 step one that plaintiff has not engaged in substantial gainful  
12 activity since onset. (Tr. 21.) At steps two and three, the ALJ  
13 found that plaintiff suffers from degenerative disk disease of the  
14 lumbar spine and depression, impairments that are severe but which  
15 do not alone or combination meet or medically equal a Listing  
16 impairment. (Tr. 21, 23.) The ALJ found plaintiff less than  
17 completely credible. (Tr. 25-26.) At step four, the ALJ found  
18 plaintiff's RFC for a range of light work permits her to perform  
19 her past relevant work as a waitress. (Tr. 27.) The ALJ's step  
20 four conclusion ended the sequential evaluation. Accordingly, the  
21 ALJ found that plaintiff is not disabled as defined by the Social  
22 Security Act. (Tr. 27.)

#### 23 **ISSUES**

24 Plaintiff contends that the Commissioner erred as a matter of  
25 law by failing to properly define "moderate" for the vocational  
26 expert. (Ct. Rec. 14 at 13-15.) The Commissioner responds that  
27 the ALJ properly weighed the evidence, including plaintiff's  
28 credibility, and correctly defined the term "moderate" for the VE

1 in the context of plaintiff's mental limitation. The Commissioner  
2 asks the Court to affirm his decision. (Ct. Rec. 17 at 6-9.)

3 **DISCUSSION**

4  
5 **A. Weighing medical evidence**

6 In social security proceedings, the claimant must prove the  
7 existence of a physical or mental impairment by providing medical  
8 evidence consisting of signs, symptoms, and laboratory findings;  
9 the claimant's own statement of symptoms alone will not suffice.  
10 20 C.F.R. § 416.908. The effects of all symptoms must be  
11 evaluated on the basis of a medically determinable impairment  
12 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
13 416.929. Once medical evidence of an underlying impairment has  
14 been shown, medical findings are not required to support the  
15 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
16 341, 345 (9<sup>th</sup> Cir. 1991).

17 A treating physician's opinion is given special weight  
18 because of familiarity with the claimant and the claimant's  
19 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
20 Cir. 1989). However, the treating physician's opinion is not  
21 "necessarily conclusive as to either a physical condition or the  
22 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
23 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
24 a treating physician than an examining physician. *Lester v.*  
25 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
26 weight is given to the opinions of treating and examining  
27 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
28 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining

1 physician's opinions are not contradicted, they can be rejected  
2 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
3 If contradicted, the ALJ may reject an opinion if he states  
4 specific, legitimate reasons that are supported by substantial  
5 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
6 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

7 In addition to the testimony of a nonexamining medical  
8 advisor, the ALJ must have other evidence to support a decision to  
9 reject the opinion of a treating physician, such as laboratory  
10 test results, contrary reports from examining physicians, and  
11 testimony from the claimant that was inconsistent with the  
12 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
13 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
14 Cir. 1995).

15 Plaintiff contends that the ALJ failed to properly define  
16 "moderate" for the VE in the context of plaintiff's assessed RFC.  
17 The argument requires a discussion of the ALJ's RFC determination,  
18 which in turn necessitates examining the weight assigned to the  
19 medical and other evidence.

20 In his first hypothetical, the ALJ posited the following  
21 mental RFC:

22 (1) moderate limitation in the ability to  
23 maintain attention and concentration for extended  
periods;

24 (2) moderate limitation in the ability to  
25 perform activities within a schedule, maintain  
regular attendance and be punctual;

26 (3) moderate limitation in the ability to  
27 complete a normal workday or workweek without  
28 interruptions from psychologically based symptoms  
and to perform at a consistent pace without an  
unreasonable number and length of rest periods.



1 (Tr. 460-461, referring to RFC check box form by consulting  
2 psychologist R. Eisenhauer, Ph.D., at Tr. 310-311.)

3 The VE asked the ALJ to define moderate. (Tr. 461.) He  
4 responded:

5 The claimant is able to understand, remember,  
6 and execute both simple and detailed instructions.  
7 Due to variable concentration and energy secondary  
8 to depression, the same concentration will be  
9 episodically compromised, although will be consistent  
10 the majority of the time. While ongoing depression  
associated with physical problems will limit tolerance  
of work stress during acute episodes, most of the time  
the individual is capable of being reasonably consistent  
on work tasks within an average work week.

11 (Tr. 461, referring to Eisenhauer's narrative explanation for his  
12 RFC at Tr. 312-313.)

13 In his second hypothetical, the ALJ gave the following mental  
14 RFC:

15 Focus and concentration mildly to moderately  
16 impaired. Pace and persistence moderately impaired.  
17 Has the intellectual capacity to understand, remember,  
18 and follow both complex and simple instructions.  
19 While depressive symptoms may create occasional  
20 difficulties completing specific tasks in a timely  
or consistent manner, interactions with others may  
be mildly disturbed by the hypothetical person's  
depressive symptoms. Stress would likely cause  
transient mild worsening in depressive and possibly  
pain symptoms.

21 (Tr. 462, referring to the January 4, 2005, psychological  
22 evaluation by Paul Michels, M.D., psychiatrist, at Tr. 241.)

23 The VE noted the stress inherent in waitress and cashier  
24 positions and precluded them under this RFC, meaning at step four  
25 plaintiff could not perform her past relevant work. (Tr. 463.)  
26 The VE gave an alternative step five opinion (not adopted by the  
27 ALJ) that there are other jobs within the RFC a person with  
28 plaintiff's limitations could perform, including mail clerk,

1 cleaner, and injection molding machine tender. (Tr. 463.)

2 The ALJ expressly adopted Dr. Eisenhower's RFC. (Tr. 23.)

3 The ALJ observes that this assessment is consistent with and  
4 supported by the medical evidence of record. (Tr. 23.)

5 The ALJ notes Dr. Eisenhower assessed moderate limitation in  
6 the ability to maintain attention and concentration for extended  
7 periods, perform activities within a schedule, maintain regular  
8 attendance and be punctual within customary tolerances, and  
9 complete a normal workday of workweek without interruptions from  
10 psychologically based symptoms and to perform at a consistent pace  
11 without an unreasonable number and length of rest periods. (Tr.  
12 24.)

13 In adopting this RFC, the ALJ considered plaintiff's  
14 credibility. (Tr. 24-26.) Significantly, plaintiff does not  
15 challenge the credibility determination in this appeal. The ALJ  
16 found plaintiff less than fully credible based on the many  
17 inconsistencies between her statements and the objective medical  
18 evidence, including testifying to "a very limited ability to  
19 stand, walk, lift, and sit," but also said "she walks a block to  
20 the gas station every hour, and there is evidence [in the medical  
21 record] that she has gone jet-skiing the last 2 summers." (Tr.  
22 25, referring to Exhibit 17F.)

23 The ALJ considered plaintiff's use of deception in narcotic  
24 drug seeking behavior. (Tr. 25.) Plaintiff denied selling her  
25 medication and blamed its disappearance on her son, or she flushed  
26 it because she didn't like it. (Tr. 25.) Plaintiff denied using  
27 illegal drugs; as the ALJ points out, she then tested positive for  
28 amphetamines. (Tr. 25-26.) In addition, plaintiff has been able

1 to go without pain medication since she was cut off in March of  
2 2007. (Tr. 26.)

3 The ALJ notes that despite claims of disabling depression,  
4 plaintiff has never pursued mental health treatment. If mental  
5 health problems are not severe enough to motivate plaintiff to  
6 obtain treatment, the ALJ reasons, it is difficult to accept her  
7 assertions that the impairment is disabling. (Tr. 26.)

8 It is the province of the ALJ to make credibility  
9 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
10 1995). However, the ALJ's findings must be supported by specific  
11 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
12 Cir. 1990). Once the claimant produces medical evidence of an  
13 underlying medical impairment, the ALJ may not discredit testimony  
14 as to the severity of an impairment because it is unsupported by  
15 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
16 1998). Absent affirmative evidence of malingering, the ALJ's  
17 reasons for rejecting the claimant's testimony must be "clear and  
18 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
19 "General findings are insufficient: rather the ALJ must identify  
20 what testimony not credible and what evidence undermines the  
21 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
22 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

23 The ALJ's reasons for finding plaintiff less than fully  
24 credible are clear, convincing, and fully supported by the record.  
25 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup> Cir.  
26 2002)(proper factors include inconsistencies in plaintiff's  
27 statements, inconsistencies between statements and conduct, and  
28 extent of daily activities). Noncompliance with medical care or

1 unexplained or inadequately explained reasons for failing to seek  
2 medical treatment also cast doubt on a claimant's subjective  
3 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.  
4 2d 597, 603 (9<sup>th</sup> Cir. 1989).

5 The ALJ is responsible for reviewing the evidence and  
6 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
7 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
8 trier of fact, not this court, to resolve conflicts in evidence.  
9 *Richardson*, 402 U.S. at 400. The court has a limited role in  
10 determining whether the ALJ's decision is supported by substantial  
11 evidence and may not substitute its own judgment for that of the  
12 ALJ, even if it might justifiably have reached a different result  
13 upon de novo review. 42 U.S.C. § 405 (g).

14 The ALJ provided clear and convincing reasons supported by  
15 the record for finding plaintiff's allegations not fully credible.  
16 The ALJ weighed the medical evidence, including that of the  
17 treating, examining and consulting professionals.  
18 The ALJ's assessment of the medical evidence and of plaintiff's  
19 credibility is supported by the record and free of legal error.  
20 Plaintiff's argument concerning the ALJ's definition of moderate  
21 is:

22 In this case, Ms. Kelley believes that the  
23 ALJ mistakenly determined that her moderate limitation  
24 is the same as no impairment at all or mistakenly  
25 explained to the vocational expert that the moderate  
26 limitations, as he states to the vocational expert in  
27 the hypothetical, were meant that she was still able  
28 to function satisfactorily. This is erroneous as in  
the *Haga*<sup>1</sup> case. If the limitations assessed in the  
hypothetical question to the vocational expert were  
meant that the individual was still able to function  
satisfactorily, then they should not have been part of

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<sup>1</sup>*Haga v. Astrue*, 482 F.3d 1205, 1208 (10<sup>th</sup> Cir. 2007.)  
ORDER GRANTING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

1 the ALJ's RFC assessment of Ms. Kelley.  
2 (Ct. Rec. 14 at 14.)

3 Clearly plaintiff is mistaken with respect to her first  
4 point: by definition the ALJ's inclusion of mental limitations  
5 indicates they are more than "no impairment at all." Plaintiff's  
6 second allegation, that the ALJ misdefined a moderate limitation  
7 as "still able to function satisfactorily," is not supported by  
8 the record. *Haga* is inapposite.

9 **B. Plaintiff's vocational expert**

10 Plaintiff contends the March 19, 2008, report submitted after  
11 the hearing by VE Ellen Nagourney shows that the ALJ failed to  
12 properly weigh the evidence, including his mental RFC  
13 determination as described to the VE at the hearing and in the  
14 ALJ's written decision. (Ct. Rec. 14 at 15-16.)

15 The court may remand based on postdecision evidence only if  
16 plaintiff shows good cause for failing to produce the evidence  
17 earlier and that the evidence is material. 42 U.S.C. § 405(g);  
18 *Mayes v. Massanari*, 276 F.3d 453, 462 (9<sup>th</sup> Cir. 2001). Even if  
19 the report is considered material, plaintiff does not establish  
20 good cause for failing to produce it until after the ALJ's adverse  
21 decision.

22 **CONCLUSION**

23 Having reviewed the record and the ALJ's conclusions, this  
24 court finds that the ALJ's decision is free of legal error and  
25 supported by substantial evidence..

26 **IT IS ORDERED:**

27 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is  
28 **GRANTED.**

The District Court Executive is directed to file this Order, provide copies to counsel for Plaintiff and Defendant, enter judgment in favor of Defendant, and **CLOSE** this file.

DATED this 12th day of March, 2009.

s/ James P. Hutton  
JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE